late one of the judges of the Queen's Bench, in a letter to the author, declared so remarkable.

The "*homo unius libri*" is proverbially a dangerous antagonist, and so in another sense he may prove a most valuable friend and ally. One test to which the writer has put Mr. Robinson's work has been on the suggestion of any difficulty to apply to his pages for the solution, and almost invariably the work has answered his appeal, either by solving the difficulty or showing him that the question is yet an open one among the learned, and introducing him to all that is important which has been said on the subject.

To the advanced student, and to the man actively engaged in the administration of the law, this work of Mr. Robinson's seems alike invaluable; a copy of it in many country towns, where well-selected libraries are rare, would be invaluable. It is to be hoped the learned author may live to complete that which has evidently been with him a labor of love. However that may be, in what has been accomplished, the author has already paid handsomely the debt which every lawyer is said to owe to his profession. To that profession we cordially recommend the book.

P. P. M.

RECENT AMERICAN DECISIONS.

Court of Appeals of Kentucky.

JOHN W. KIMBROUGH, APPELLANT, *v.* GEORGE LANE ET AL., APPELLEES.

A contract having for its consideration an agreement to suppress a criminal prosecution is void.

It is equally so, if any part of the consideration was the suppression of the prosecution, and whether the contract was induced by promises or threats on one side or the other.

It is not necessary that the promise should be made at the same time as the contract; it is sufficient if it was made prior thereto, and was acted upon as a part of the consideration or inducement.

Nor does it make any difference that a prosecution is already commenced and is in the hands and under the control of the Commonwealth's officer, if the private prosecutor, as consideration for the contract, promises to abandon his own efforts in the course of justice. The particular interest of the party injured, in bringing the offender to justice, is one of the securities of the public in the enforcement of the laws, and any agreement by which this interest is turned against the Commonwealth is void.

THIS was a suit in equity, brought by appellant in the Bath Circuit Court, against the appellees, George Lane and T. C. Owings,

on a note for $3000, executed by them to him September 18th 1872, which recites that it was given in consideration of a note due by Lane & Brothers to the appellant for $8600, from which they had been discharged in bankruptcy.

He also sought to foreclose a mortgage upon sixty-seven and a half acres of land, given by Owings to secure the payment of the note, and J. A. J. Lee having purchased the land, was made a defendant.

The defendants answered in substance that George Lane, for himself and brothers, purchased and received of the plaintiff a number of mules, for which a note was executed to and accepted by him; that afterward the plaintiff came to the said George and expressed some uneasiness as to the sufficiency of the note, and prevailed on the said George to execute to him a mortgage on a tract of land to secure the debt; that about March 1872, the plaintiff was foreman of the grand jury of Harrison county, and induced said grand jury to find and present an indictment against said George for obtaining the mules by false pretences; that he was arrested, and while in attendance at the Harrison Circuit Court for trial on said charge, "the plaintiff proposed and agreed to and with said George that if he would pay or secure to him $3000 he would have the criminal prosecution aforesaid dismissed, and that he would not appear as a witness against him. He and his wife were the prosecuting witnesses, and the defendants say in consideration that the plaintiff would procure the dismissal of said prosecution, the bond sued on was executed, and the plaintiff did thereupon, in consideration thereof, abandon the prosecution and procured its dismissal. The mortgage was executed by defendant Owings at the same time and for no other consideration."

The cause subsequently came into the Bath County Court of Common Pleas, where a trial was had, which resulted in a judgment dismissing the petition, and this appeal is prosecuted to reverse that judgment.

A. Duval, Nesbitt & Gudgell and *Wm. H. Holt*, for appellant.

Apperson & Reid and *Reid & Stone*, for appellees.

The opinion of the court was delivered by

COFER, J.—It is an old and well-settled rule of the common law that contracts having for their consideration an agreement to stifle

a criminal prosecution are void, because they are against the policy of the law, which will not permit an injury to the public to be made the subject of private agreements whereby the redress of the public wrong may be hindered or defeated. And it is equally well settled that if any part, however small, of the entire consideration of a contract be vicious, the whole contract is void.

Every citizen is under an obligation to the public to abstain from voluntarily placing himself in a position in which it is to his pecuniary interest to suppress, stifle or impede a public prosecution. "The Commonwealth has a right to rely upon the individual who has received special injury from the commission of a public offence, as the special instrument for its ascertainment and punishment in the due course of law."

"The particular interest which he may be supposed to feel in bringing the offender to justice is one of the securities on which the public relies, and has a right to rely, for the enforcement of the laws and its own safety, and an agreement by which this interest is turned against the Commonwealth is in violation of her rights and policy:" *Gardner* v. *Maxey*, 9 B. Mon. 90; *Swan, &c.*, v. *Chandler & Phillips*, 8 Id 98.

That such is the law was conceded in the argument, but it was insisted that the evidence did not show that such an agreement as that set forth in the answer was made. George Lane and Owings both testified directly and positively that an agreement in substance the same as that set forth in the answer was made. This, however, is contradicted by the appellant and two other persons present at the time the agreement to execute the note and mortgage was finally entered into, who say that the appellant then distinctly said that he could not make any arrangement with Lane by which he would agree to have the indictment dismissed, or fail to appear as a witness against him; that the case was in the hands of the Commonwealth, and would have to be disposed of by the court; that he could in no way control the prosecution, and would not undertake to do so.

The appellant swore that he did not speak to the Commonwealth's attorney on the subject of dismissing the indictment, and the attorney swore that he dismissed it because, after talking with the witnesses, he was satisfied he could not make out a case. If this was all the evidence in the record upon the subject, we should incline to the opinion that the agreement set forth in the answer

was not established by the evidence; but there are other important facts which, although they do not prove that there was an express agreement made at the time the note and mortgage were given, prove that appellant and Lane and Owings then understood that the prosecution would be abandoned if the sum of $3000 was secured to the appellant, and that the execution of these securities was the condition on which he would not only refrain from a vigorous prosecution through counsel employed by him for that purpose, but would abandon all efforts to bring Lane to trial.

The prosecution was called September 16th 1872, and set for trial on the 18th of that month, and attachments were awarded against absent witnesses for the Commonwealth. On the 18th, after the case was called for trial, the appellant and his counsel employed to aid in the prosecution, retired with Lane and Owings, and one of the Commonwealth's witnesses, to a consulting-room in the court-house, and there, while the question of proceeding with the trial was before the court, and when, for aught that appears, the Commonwealth was ready to proceed with the trial, the appellant entered into, or rather renewed, negotiations with Lane for securing a part of his debt, from which, according to the recital in the note then given, Lane had been discharged in bankruptcy. Owings proved, without contradiction by any one, that during this interview the appellant desired him (Owings) to mortgage his land to secure the sum of $3000; that he was unwilling to do so, but offered to give him personal security, which he refused to accept; that the appellant then rose from his seat and said that "that was the last damned proposition he intended to make; that he had Bath county money to prosecute George Lane with;" and thereupon Owings agreed to execute the mortgage, and did so.

Appellant agreed, if this was done, to discharge the attorney he had employed to aid in the prosecution, and immediately did so; and he also promised that if Lane was brought to trial on the indictment he would surrender the note and mortgage.

Some of the Commonwealth's witnesses, against whom attachments were awarded on the 16th, and who were present on the 18th, returned home that day, and no further action seems to have been taken in the case until September 24th 1874, when, on motion of the attorney for the Commonwealth, the indictment was dismissed.

Owings's deposition was taken in December 1873, and he proved

that prior to the execution of the note and mortgage, the appellant said to Lane that, for $2500 in cash, or $3000 on time, he would dismiss the prosecution.

This proposition, he says, was not made in his presence, but Lane and appellant were in a room together and sent for him, and appellant then told him what proposition he had made. The appellant gave his deposition in March 1874, but failed to contradict Owings's statement. After the date of the note and mortgage, and before the indictment was dismissed, appellant wrote to Lane as follows:—

"I think I am fully satisfied that you are co-operating with parties to put me to some trouble to secure the money on the note I hold against you. All I have to say to you is this: I was taken out by several persons the day I was in Owingsville, and an effort made to get from me something to commit you in your county. I evaded all questions. You know what I promised you, but that promise depends upon your action in this matter. If anything is gotten hold of against you in Bath county you will find things hotter than you have any idea of at this time. Everything depends upon, not what you can do to refute, but to advance this matter to a final settlement."

These facts leave no room to doubt that, at the time the note and mortgage were given, it was understood by all parties present that the prosecution would end, so far as appellant was concerned, as soon as the required security was given, and it is equally clear that it was likewise understood that, unless they were given, the case would go on as far as it was in his power to carry it on.

Why declare that he had made his last proposition, and that he had money to carry on the prosecution, if he did not mean to be understood as intending to carry it on, if his demand was not acceded to, and to abandon it if his debt was secured?

If he had made no promise, express or implied, to abandon the prosecution, to what promise did he refer in his letter? If the further prosecution was not to be abandoned, why not proceed with it in September 1872, when, as far as appears, the Commonwealth was ready to go on with it?

Considerable stress is laid by his counsel upon the declaration proved to have been made by the appellant at the interview, which resulted in the execution of the note and mortgage, that he could not make any arrangement by which he would undertake to have

the indictment dismissed, and that he would not fail or refuse to testify if called for that purpose; that the case was in the hands of the Commonwealth, and would have to be disposed of by the court.

If this evidence stood alone in the record it might be entitled to some consideration, but when viewed in connection with his former offer to dismiss the indictment for $2500 in cash, or $3000 on time, and his declaration at the time when the negotiation was closed that he had made his last proposition, and had money to prosecute Lane with, his agreement to surrender the note and mortgage if the prosecution went on; the fact that from that moment it seems to have been wholly abandoned, and the reference in his letter to Lane to the promise he had made, and his covert threat, if Lane did not keep the promise made by him, we do not regard the declaration that he did not intend to bind himself to interfere between Lane and the Commonwealth as furnishing any evidence whatever that he did not make the promise imputed to him in the answer.

It is not necessary that the promise should have been made at the very moment, or even on the same day, of the execution of the writings; it is enough if it appears that such a promise was made at that time or prior thereto, and that all parties acted in view of that promise, or that it was the inducement which operated upon the minds of the obligors.

The appellant was the person alleged to have been injured by the act for which Lane was indicted, and the public had a right to rely upon the interest which he would naturally feel in having him brought to punishment in due course of law, and has a right to complain of a contract, the direct natural effect of which was to turn that interest against the Commonwealth. Such contracts are highly reprehensible when made by one having no other relation to a prosecution than that of being the person injured by the public offence, but when, in addition to being the party specially aggrieved, he is also connected with the origin of the prosecution by having been a member of the grand jury by which the indictment was found, the courts should scan the transaction with jealous vigilance in order to avoid being made the instruments of oppression in the hands of those who, for vengeance or profit, may seek through public prosecution to extort money to which they are not legally entitled, or for the recovery of which civil process affords them no

remedy, and for the further purpose of guarding the instrumentalities provided by law for the detection and punishment of crime from corruption.

No citizen can be put upon trial for an infamous crime, except upon the indictment of a grand jury. This has been thought so valuable a safeguard to individuals as to deserve a place in the Bill of Rights in our Constitution. But it will prove a snare instead of a protection if a member of a grand jury, conceiving himself to have been the victim of a felony, may, by his own testimony, and, if need be, his own vote and personal influence with his fellow grand jurors, procure an indictment against the supposed criminal, and then by threats of a vigorous prosecution if his private grievance is not redressed, and promises express or implied that he will forbear if they are complied with, obtain an enforcible contract for his own indemnity.

Where a person injured by a criminal act was himself a member of the grand jury by which the alleged offender was indicted, and the aggrieved person enters into negotiations with the accused for his own indemnity for losses resulting from the criminal act, and the prosecution is suddenly abandoned, especially after threats that it will be carried on vigorously unless indemnity be made, it will require but slight evidence to satisfy the court, not only that there was an agreement to compound the offence, but that the prosecution was set on foot to bring the accused and his friends to terms.

It is urged by some of appellant's counsel that as Lee purchased the land mortgaged by Owings, subject to the mortgage, and he will be so much the gainer if the appellant fails in his efforts to foreclose, while Owings and Lane will gain nothing, this ought to have some weight with the court in deciding the question.

It is sufficient to say on this point that the rule of law inhibiting such contracts was not made for the benefit of the obligors in the illegal contract. They stand in no better position in the eyes of the law than the obligees.

The courts will not enforce such contracts, because they are levelled at the safety and repose of society, and are calculated to shield the guilty from punishment and leave them free to prey upon the public. If money is paid upon such a contract, the courts will not aid in recovering it back; they will leave both parties in the exact position in which they have placed themselves. Though we differ somewhat from the learned judge below in our

conclusion from the facts, his judgment is right and must be affirmed.

The foregoing opinion discusses a question of great practical importance, in regard to which we fear the law of this country is by no means up to the standard of the English common law, either in principle or administration. The rule in the English courts is very extensively discussed in *Wells* v. *Abrahams*, Law Rep. 7 Q. B. 554, in regard to the right of any civil remedy, and what remedy, the party aggrieved by a felonious act, which also involves an infraction of private right, may demand in a court of justice.

It seems to have been intimated in some of the early English cases, that the civil remedy, or right of action, is merged in the felony: *Higgins* v. *Butcher*, Yelv. 89; *Dawkes* v. *Coveneigh*, Styles 346; BULLER, J., in *Masters* v. *Miller*, 4 Term Rep. 320-332; *Crosby* v. *Long*, 12 East 409. In the latter case it was held only to be suspended till the defendant was convicted or acquitted of the criminal charge without connivance. But later cases treat the civil right of action as merely suspended until the offender shall be convicted: *Wellock* v. *Constantine*, 2 Hurlst. & Colt. 146; *Gimson* v. *Woodfall*, 2 C. & P. 41; *White* v. *Spettigue*, 13 M. & W. 603. And the rule does not apply to one who waived the right innocently.

In the case of *Wells* v. *Abrahams*, *supra*, it is agreed by all the judges, that, although the felon cannot plead his own crime either in bar or suspension of the civil remedy, as held in *Luttrell* v. *Reynell*, 1 Mod. 282, yet that if the felony appear either upon the declaration or evidence, it is competent in some proper mode to stay proceedings in the civil action, until the felon shall be convicted. Some of the cases go the length of holding that in such case it is the duty of the court to interfere *sua sponte* and stay the civil action: *Gimson* v. *Woodfall*, *supra*; *Wellock* v. *Constantine*, *supra*. But this doctrine has been repudiated: *White* v. *Spettigue*, *supra*; *Wells* v. *Abrahams*, *supra*. But the latter case distinctly recognises the rule of law that the civil remedy is suspended during the prosecution for felony and cannot be pressed until that has been terminated either by conviction or acquittal without plaintiff's connivance: *Crosby* v. *Long*, *supra*.

But we are not aware that this rule has ever been enforced to any great extent, if at all, in this country: Metcalf's note 2 to *Higgins* v. *Butcher*, Yelv. 89. But the rule of the common law, that all contracts for compounding or stifling prosecutions for felony are illegal and void, is maintained here to the fullest extent. The compounding of felony or stifling prosecutions therefor, is also indictable as a misdemeanor in most of the American states, either by special statute or by force of common law. It has often been intimated in English cases that this rule did not extend to mere misdemeanors, and that parties interested in such prosecutions might lawfully compound them: *Elworthy* v. *Bird*, 9 Moore 230; 2 Bing. 258; *Drage* v. *Ibbetsons*, 2 Esp. 643; ELLENBOROUGH, Ch. J., in *Taylor* v. *Lendey*, 9 East 49. But this rule is confined, we believe, to prosecutions for offences where the party aggrieved is principally concerned, and where the compromise is effected under the advice of the court, by virtue of the English statute 18 Eliz., c. 5, s. 3. For in *Collins* v. *Blantern*, 2 Wilson 341, 1 Smith's L. C. 489, the question how far the contract for stifling or compounding a prosecution for perjury, which is only a misdemeanor in England, and securities given in furtherance of such compromise, may be enforced in the courts, was greatly dis-

cussed, and it was clearly held, that no action can be maintained upon any such contract where any part of the consideration arises from such compromise, thus making no distinction between felony and other offences of similar enormity.

We have examined the facts upon which the court deny the validity of the contract in the principal case, and it seems to us the decision is based upon most satisfactory grounds; for the contract seems to have had no other consideration but the compromise or abandonment of the prosecution against the defendant, and was expressly agreed to be surrendered if the defendant were brought to trial. There would seem, then, to be no ground to argue that the contract did not rest exclusively upon the abandonment of the criminal prosecution, which, though not for a felony, was an offence of the same public character and of great moral turpitude.

I. F. R.

Superior Court of New Hampshire.

PERRY ET AL. *v.* CITY OF KEENE.

The laying of taxes is a legislative function, and the policy and expediency of it, as well as its amount, are questions exclusively for that department of the state.

There is no abstract legal principle by which to determine whether a use is public; a court must decide it as a conclusion of fact and public policy, in the same manner as the legislature. Hence, while it is clearly the duty of a court to determine finally what is a public purpose, it will only decide adversely to the judgment of the legislature in a clear case.

If a purpose is public, it makes no difference that the agent by whom it is to be carried out is a private individual or corporation.

The building of a railroad is a public purpose; and a statute authorizing a town to vote money to aid in such purpose, even though the money is to be given as a *gratuity* and not as a subscription to stock, is not unconstitutional as a taking of private property for a private use.

THIS was a bill in equity, by certain tax-payers in Keene, praying for an injunction to restrain the defendants from issuing bonds, &c., in aid of the construction of the Manchester and Keene Railroad, in pursuance of a vote of the city councils to that end. The facts are stated in the opinion.

Sargent & Chase and *Hardy*, for the plaintiffs.

Lane, *Faulkner* and *Burns*, for the defendants.

LADD, J.—"Any town may, by a two-thirds vote, raise, by tax or loan, such sums of money as they shall deem expedient, not exceeding five per cent. of the valuation thereof, * * * and appropriate the same to aid in the construction of any railroad in this state, in such manner as they shall deem proper:" Gen. Stats.,

ch. 34, § 16. In accordance with the provisions of this statute, the inhabitants of the city of Keene have voted a subsidy equal to three per cent. of their last property valuation, to aid in the construction of that part of the Manchester and Keene Railroad located between Greenfield and Keene. This sum, amounting to upwards of $130,000, is called a "*gratuity*" in the vote. It is, in fact, an appropriation of that amount, to be raised by a public tax, to the purpose of building a railroad, with no equivalent, except the expected benefits to be derived from the opening of such railroad. The plaintiffs, who are citizens and large tax-payers in Keene, contend that the legislature, in passing the act quoted above, transcended the limits of their constitutional power; that the action of the city in voting the gratuity is therefore without warrant of law, and they ask for an injunction to prevent the issuing of bonds or the levy of taxes in accordance with said vote.

The question we are thus called upon to consider is an important one, not only in its legal aspects, but in its practical bearing upon the rights and interests of these parties, as well as others in a similar situation, both tax-payers and holders of municipal bonds heretofore issued for a like purpose under the authority of the act in question.

In one view, the duty of the court is extremely plain and simple; in another, it is delicate and not free from difficulty. We have not to inquire into the policy of the law or (if the purpose be admitted to be public) whether the supposed public good to be attained was sufficient to justify the legislature in conferring upon two-thirds of the legal voters of a town the power to devote, not only their own property, but that of the unwilling other third, to such a purpose. All mere questions of expediency, and all questions respecting the just operation of the law, within the limits prescribed by the constitution, were settled by the legislature when it was enacted. The court have only to place the statute and the constitution side by side, and say whether there is such a conflict between the two that they cannot stand together. If, upon such examination, there appears to be a conflict, and if the conflict is so clear and palpable as to leave no reasonable doubt that the legislature have undertaken to do what they were prohibited from doing by the constitution, the court cannot avoid the high, though unwelcome, duty of declaring the statute inoperative, because the constitution and not the statute is the paramount law, and the court must interpret and administer all the laws alike.

The learned counsel for the plaintiffs have not pointed out the particular part or clause of the constitution which they say is violated by this statute. Their position, however, is that the act authorizes the taking of private property under the name and guise of taxation, and appropriating it to a use that is really and essentially private; and that such a proceeding, being manifestly at war with those fundamental principles upon which the right of the citizen to be secure in the possession and enjoyment of his property depends, is in violation of all those provisions in the constitution established to guard and perpetuate that right.

The proposition assumes this form: The legislature are forbidden by the constitution to exact money from the people of the state under the name of taxes and apply it to a private purpose; this statute authorizes the act thus forbidden, and is therefore void. The first part of this proposition is admitted by the defendants, and so we need not now inquire in what particular provision of the constitution the inhibition is to be found. Whether it rests upon the commonly received meaning and definition of the terms: taxes, rates, assessments, &c., used in the constitution, and the general guaranties of private property contained in the Bill of Rights, or whether, by a fair construction of art. 5, the levying of all taxes, municipal as well as state, is limited to the purposes therein named, viz., for the public service, in the necessary defence and support of the government of this state, and the protection and preservation of the subjects thereof, is at present immaterial, inasmuch as we are to start with the assumption that taxes cannot be imposed or authorized by the legislature for any other than a public purpose.

Is the building of a railroad a public purpose? The legislature have undoubtedly passed their judgment on that question, and determined that it is. It is not to be denied that the levying of taxes is specially and entirely a legislative function, and the court are not to encroach upon the province of a co-ordinate branch of the government in the exercise of that power. Where is the line that divides the province of the court from that of the legislature in a matter of this sort? The court is to expound and administer the laws, and there the judicial function and duty ends. How much of the question, whether a given object is public, lies within the province of the law, and how much in the domain of political science and statesmanship? When the judge has declared all the

law that enters into the problem, how much is still left for the determination of the legislature? Admitting, as has, indeed, been more than intimated in this state (*Concord Railroad* v. *Greeley*, 17 N. H. 57), that it is for the court finally to determine whether the use is public, what is the criterion—what are the rules which the law furnishes to the court, wherewith to eliminate a true answer to the inquiry? In what respect does the question as presented to the court, differ from the same question as presented to the legislature? If the court stop, when they reach the borders of legislative ground, how far can they proceed? If the legislature should take the property of A., or the property of all the tax-payers in the town of A., and hand it over without consideration, without pretence of any public obligation or duty to B., to be used by him in buying a farm, or building a house, or setting himself up in business, the case would be so clear, that the common sense of every one would at once say the limits of legislation have been overstepped, by a taking of private property and devoting it to a private use. That is the broad ground upon which such cases as *Allen* v. *Jay*, 12 Am. Law Reg. N. S. 481, s. c. 60 Me. 124; *Lowell* v. *Boston*, 111 Mass. 454; and *The Citizen's Loan Association* v. *Topeka*, Sup. Ct. U. S., were decided. And yet what rule of law do the courts find to aid them in thus revising the judgment of the legislature? Is it not clear that the question they pass upon is the same question as that decided by the legislature, and that they must determine it in the same way the legislature have done, simply by the exercise of reason and judgment?

What is it that settles the character of a given purpose in respect of its being public or otherwise? It has been said that for the legislature to declare a use public, does not make it so (17 N. H. 57), and the same may certainly be said, with equal truth of a like declaration by the court. A judicial christening can no more affect the nature of the thing itself than a legislative christening. Judging *a priori*, and without some knowledge of the wants of mankind when organized in communities and states, I do not quite understand how it could be predicated of any use that it is *per se* public: DIXON, C. J., in *Whiting* v. *Sheboygan Railway Co.*, 9 Am. Law Reg. N. S. 161.

Of light, air, water, &c., the common bounties of providence, it might, indeed, be said beforehand that they are in a very broad sense public; but it is not of such uses that we are speaking.

Without knowledge of human nature, knowledge derived from experience and observation of what may be needful for the comfort, well being and prosperity of the people of a state advanced in civilization, and knowledge gained in the same way as to what necessary conditions of their welfare will be supplied by private enterprise, and what will go unsupplied without interference by the state, I do not see how any use could be said to be *per se* public, or how either a legislature or a court could form a judgment that would not be founded almost wholly upon theory and conjecture. No one doubts that the building and maintaining of our common highways is a public purpose. Why? Certainly for no other reason than that they furnish facilities for travel, the transmission of intelligence and the transportation of goods. But why should the state take this matter under its fostering care, imposing upon the people a very great yearly burden in the shape of taxes for their support, any more than many others that might be mentioned of equal and perhaps greater importance to its citizens?

Is it of greater concern to the citizen that he should have a road to travel on when he desires to visit his neighbor in the next town, or transport the products of his farm or his factory to market and bring back the commodities for which they may be exchanged, than that he should have a mill to grind his corn, a tanner, a shoemaker and a tailor to manufacture his raw material into clothing wherewith his body may be covered? Doubtless highways are of great public benefit, without them I suppose the whole state would soon return to its primal condition of a howling wilderness, fit only for the habitation of wild beasts and savages. How would it be if there were no mills for the manufacture of lumber, no joiners or masons to build houses, no manufacturers of cloth, no merchants or tradesmen to assist in the exchange of commodities?

These suppositions may appear somewhat fanciful, but they illustrate the inquiry, Why is the building of roads to be regarded as a public service, while many other things, equally necessary for the upholding of life, the security of property, the preservation of learning, morality and religion, are by common consent regarded as private, and so left to the private enterprize of the citizen? The answer to this question surely is not found in any abstract principle of law. It is essentially a conclusion of fact and public policy, the result of an inquiry into the individual necessities of

every member of the community, which in the aggregate show the character and urgency of the public need, and the likelihood that those necessities will be supplied without interference from the state. Obviously it bears a far closer resemblance to the deduction of a politician than the application of a legal principle by a judge. Should it be found by experience that no person in the state would, voluntarily and unaided, establish and carry on any given trade or calling, universally admitted to be necessary for the upholding of life, the preservation of health, the maintenance of decency, order and civilization among the people, would not the carrying on of such necessary trade or calling thereupon become a public purpose, for which the legislature might lawfully impose a tax? Experience shows that highways would not be built, or, if built, would not be located in the right places with reference to convenient transit between distant points, nor kept in suitable repair, but for the control assumed over the whole matter by the state; and so the state interferes and establishes a system, and imposes an enormous burden upon the people, in the shape of taxes, compelling them to supply themselves with what they certainly need, but need no more than they need shoes or bread, and nobody ever complained that the interference was unauthorized or the purpose other than a public one.

Enough has been said to show the delicate nature of the task imposed upon the court, when they are called upon to revise the judgment of the legislature in a matter of this description. It is especially delicate for two reasons; first, because the discretion of the legislature with respect to the whole subject of levying taxes is so very large, and their power so exclusive that it is not always easy to say when the limits of that discretion and power have been passed; and second, because the rule to be applied, is furnished, not so much by the law as by those general considerations of public policy and political economy, to which allusion has been made. I do not deny the power and duty of the court, when private rights of property are in question, to settle those rights according to a just interpretation of the constitution; and the discharge of that duty may involve a revision of the judgment of the legislature upon a question which, like this, partakes more or less of a political character.

But before the court can reverse the judgment of the legislature

and the executive, and declare a statute levying or authorizing a tax to be inoperative and void, a very clear case must be shown.

After the legislature and the executive have both decided that the purpose for which a tax is laid, is public, nothing short of a moral certainty that a mistake has been made can, in my judgment, warrant the court in overruling that decision, especially when nothing better can be set up in its place than the naked opinion of the court as to the character of the use proposed.

Certainly it is not for the court to shrink from the discharge of a constitutional duty; but at the same time it is not for this branch of the government to set an example of encroachment upon the province of others. It is only the enunciation of a rule, that is now elementary in the American states, to say that, before we can declare this law unconstitutional we must be fully satisfied, satisfied beyond a reasonable doubt, that the purpose for which the tax is authorized is private and not public.

I have spoken incidentally of our common highways, and it has been said that their purpose is to furnish to the public facilities for travel, for the transmission of intelligence and the carrying of goods. No one will contend that to build and maintain them is not a public purpose. Indeed the public nature of this use is so very obvious that it has been classed among those said to be public *per se* (*Whiting* v. *Sheboygan Railway Co.*, *supra*), standing in need of no credentials from the court to entitle it to legislative recognition. Wherein does the use of a railroad differ? What public benefit can be mentioned that comes from the building of a common road, which does not come, in kind, if not in degree, from the building of a railroad? It is not necessary to enlarge upon the benefits of either; they are doubtless numerous and varied, so numerous indeed, so interwoven with everything that distinguishes an intelligent, virtuous, rich, well organized and well governed state, from a tribe of primitive barbarians, that an attempt to trace them all would be little less than an attempt to search out the sources of our civilization. The point is they are alike in kind, and when it is admitted that the construction of one class of roads, is clearly, beyond all possibility of doubt, a public purpose, I cannot conceive upon what ground it is to be said, that the construction of the other class, is beyond all reasonable doubt a private purpose.

It is said that railroad corporations are private; that the roads

are built and run for private gain; that the public can only enjoy the benefits offered by them, upon payment of a toll, and therefore the purpose is private. The short and conclusive answer to all this, in my mind, is that the character of the agency employed, does not and cannot determine the nature of the end to be secured. To say of a railroad corporation, that it is a private corporation, and therefore the construction of a railroad is a private purpose, seems to me, in truth, no more logical, if less absurd, than to say of any officer or agent of the state, he is an individual with all the private interests and private associations of other citizens, therefore the purpose of his office, and of all his official acts, is private. The argument that because a toll is granted, therefore the purpose must be private, carried to its logical results, would certainly declare the purpose of a very large number of public offices in the state to be private; among them the secretary of state, justices of the peace and of police courts, registers of probate, registers of deeds, sheriffs, clerks of the courts, town clerks, &c., &c. If the purpose is public, it makes no difference that the agent by whose hand it is to be attained is private, nor, if the purpose were private, would it make any difference that a public agent was employed. The question, therefore, whether a railroad corporation is to be regarded as public or private, or both, that is, public in one aspect and private in another, seems to me quite immaterial, and that the decision of that question one way or the other does not advance the inquiry we have in hand.

It has been admitted by some, who have maintained with singular ability and zeal the position of the plaintiffs in this case, that the state might legally take into its own hands, the whole matter of railroads within its limits—might build, equip, operate and control them, making use of no intermediate agents in the business; because in that case, the people would remain owners of the property into which their money has been converted. With great deference, it seems to me, this is a concession of the very point in dispute. The form of the argument seems to be this: the state cannot levy a tax for a private purpose (so much all admit); the building of a railroad is a private purpose; but the state may nevertheless levy a tax to build a railroad, provided, the tax be large enough to carry through the whole enterprise without calling in the aid of any other agency.

Or to draw from the same premises, the conclusion sought to be

established here; the state cannot levy a tax for a private purpose; the state may levy a tax to wholly build, equip and run a railroad; therefore, the building of a railroad is a private purpose. This does not bear examination.

Another argument may be noticed here. It has been said by courts whose decisions we are accustomed to regard with great respect, that, admitting the power of the legislature to authorize towns and cities to subscribe for stock in railroad corporations and issue bonds or levy taxes in payment thereof, it does not follow that they can lawfully authorize the direct appropriation of the public funds to aid in the construction of a railroad where no stock is taken; because in that event, no interest or ownership results to the town in the property of the corporation, and no voice in the control or management of its affairs is secured. I do not understand how this can be said by a court of law. Upon what ground can the legislature authorize the raising of a tax to pay for stock in a corporation of any sort, unless the purchase of such stock will be a devotion of the public funds to a public service? It is a matter of common knowledge that the original stock in railroad corporations often becomes worthless or nearly so; but whether such a result is to be apprehended or not makes no difference, as far as I can see, with the argument. If the end in view is private and not public, the legislature might as well authorize a town to enter into copartnership with any private person in the prosecution of any private enterprize or business, and furnish its stipulated proportion of the capital to be invested by levying a tax, as to authorize it to purchase such stock, even were it likely to advance in value on their hands, and the people thus be gainers by the operation. Deny that the end is public, and at the same time admit that a tax may be levied for the purchase of the stock, and the inevitable conclusion appears to be, that towns may be authorized to engage in the private and perilous business of dealing in stocks, and so apply the public funds to a purpose as remote as any that can well be conceived from that permitted by the constitution, to say nothing of the fact that such investment must be made with a reasonable assurance that the money will be lost. Clearly, one or the other of these propositions must be changed; either we must admit that the end in view is public, or deny the power to purchase stocks when the end in view is merely a private one.

It is said that the power to tax involves the power to destroy; and that this is true is well shown by the recent example of the state banks, whose existence was terminated by a tax of ten per cent., imposed by Congress on their circulation. But how does this strengthen the position of the plaintiffs? They say that if the legislature have the constitutional right and power to authorize a tax of three per cent. to aid this railroad, they have the constitutional right and power to levy a tax upon all the property in the city of Keene equal to the full value of such property, and give that to the same road. Suppose this be granted, what does it prove as to the object for which the tax is laid? Is it not equally true that they might authorize a tax equal to the full value of all the property in the city for the support of the public schools, the public highways, or any other object of a confessedly public nature? The suggestion is plainly of no force in an inquiry as to the nature of the purpose for which a tax has been authorized or levied, for the reason that the supposed power of destruction is a necessary incident of the taxing power, and follows it, whatever be the object for which it is put forth, whether public and legal, or private and illegal. It amounts to little more, in the present case, than the truism that any governmental power may be abused by the agent in whose hands it is reposed.

But, if the question on which this case must turn has been rightly apprehended, I think it was decided more than thirty years ago in the case of *The Concord Railroad* v. *Greeley*, 17 N. H. 47, where it was held that a railroad is in general such a public use as affords just ground for the taking of private property, and appropriating it to that use. A glance at the yearly legislation in this state with reference to the taking of land for railroads against the owner's consent is sufficient, without looking elsewhere, to show that for several years before the case of *Concord Railroad* v. *Greeley* arose, much doubt was felt by the legislature and the people at large, as to the existence of such a right; and a strong disposition is manifest to deny its exercise. The first charters to railroad corporations, granted the right to lay out their road, and necessarily to take land for that purpose. See Private Acts of 1835, pp. 201, 212, 223, 264; Private Acts of June session 1836, p. 341; Private Acts of 1837, p. 336; Private Acts of 1839, pp. 456, 470. At the June session of 1836, a general law was passed, entitled, an act to provide a more cheap and expeditious mode

of assessing damages for land or materials taken by railroad corporations, which unequivocally recognises the existence and validity of the right thus conferred by the charters: Public Acts, June session 1836, p. 299. This act was repealed at the November session of the same year, and an act substituted in place of it covering the same general ground, but more comprehensive and specific in its details, providing for an assessment of damages by jury in case the parties were not content with the award of the committee, &c.: Public Laws, November session 1836, p. 248. Approved January 13th 1837. It is noticeable also that at the November session 1836, an act was passed (approved January 14th 1837), authorizing the town of Concord to purchase and hold stock in the Concord Railroad corporation to an amount not exceeding $30,000: Public Acts, November session 1836, p. 316.

But before 1840, for reasons that are well known, but need not be stated here, the public mind became somewhat agitated upon the general subject of the legal relations borne by railroad corporations to the people and government of the state, and the rights and duties of such corporations, and the power of the legislature to appropriate private property to their use, without the owner's consent. We accordingly find that at the June session of that year, an act of a somewhat sweeping character was passed, whereby the Acts of June 1836 and January 1837, in reference to the assessment of damages, and the act authorizing Concord to purchase and hold stock in the Concord Railroad, were all expressly repealed, and it was further enacted, "that from and after the passage of this act, it shall not be lawful for any corporation to take, use or occupy any lands, without the consent of the owner thereof, unless the construction of the work contemplated in the act of incorporation shall have been commenced prior to the passsage of this act:" Laws of June session 1840, ch. 498, p. 438. At the November session of the same year, another act was passed which, whether called forth by actual grievances or not, shows in a striking light the state of public sentiment and the temper of the legislature. It was enacted "that from and after the 15th day of March A. D. 1841, it shall be lawful for the owner or owners of any land taken by any railroad corporation, in the construction of their railroad, when such landowner shall not have been fully compensated for the same on or before the 15th day of March 1841, to remove the rails from said railroad, fence up the land, and take and retain

possession of the same until entire satisfaction is made to the owner or owners of the land thus taken:" Laws of November session 1840, p. 504. This latter act was repealed by the Revised Statutes which went into effect March 1st 1843, but the provision of the former, that no railroad corporation shall take any land for the use of said corporation without the consent of the owner thereof, was retained and appears as sect. 1 of ch. 142, R. S. Things remained in this position until 1844, when an act was passed, entitled "An Act to render railroad corporations public in certain cases, and constituting a board of railroad commissioners:" Laws of November session 1844, ch. 128. Section 8th of this act contains an elaborate provision for a lease under the seal of the state, signed by the governor and certified by the secretary of state, whereby the right to construct a railroad over the route proposed should be granted and guaranteed to the corporation for a term not less than one hundred, nor more than two hundred years, *for the public use and benefit*, with the right of user in the same, to pass and repass with their locomotives, cars and vehicles of transportation thereon, &c.—a device for finding the way out of a dilemma, which would not do discredit to the ingenious inventors of many of the legal fictions with which the common law still abounds.

The next year (1845) came the case of *Concord Railroad* v. *Greeley*, where the constitutional power of the legislature to authorize the taking of private property for such a use was strenuously denied. It is obvious, even without going outside the statute just referred to for evidence, that this was a question which had seriously engaged the public mind, and one upon which opinions greatly differed. Under these circumstances it was natural that the case should receive a careful examination by the court; and I think it may justly be said that the opinion by Mr. Justice GILCHRIST is among the most valuable to be found upon the general subject of which it treats. He says: "The constitution of this state is not so much a constitution delegating power, as a constitution regulating and restraining power. All power in the largest terms applicable to such a subject, is conferred by the people, through the constitution, upon the general court, subject to the condition in its exercise, that it shall pass no laws repugnant to the limitations and restrictions in the constitution." He considers the objection that the power of eminent domain cannot be exercised

except through the medium of a public corporation, and says the question involved is not what is a public, and what is a private corporation, but whether this corporation be one that may hold the land of an individual for the public use.

In considering the great question in the case, namely, whether the proposed use was public, he says: "It is sufficient for this occasion to say, that the use of a thing may be considered public, so far as to justify the exertion of the legislative prerogative in question, if it be devoted to the object of satisfying a reasonable pervading public demand, for the facilities for travel, for transmission of intelligence and of commodities, not extraordinary as compared with those enjoyed by communities of like pursuits. Such objects rank themselves in fact among the first duties of a government from the moment that it has secured itself against foreign aggression and established tranquillity within its own borders. Without these the citizen pines in seclusion. The bounties of nature and the fruits of his labor which commerce would transmute into wealth are wasted, and he provides himself with difficulty, if at all, with those things which embellish home and render its appropriate enjoyments possible." I am not aware that the soundness of this opinion has been questioned; certainly it has been acquiesced in and acted upon by the legislature and the people, as the undoubted law of the state ever since it was rendered. The legislature has again and again, in a variety of forms, directly and indirectly, declared the use to be public, and has jealously guarded against the possibility of an inference that the right thus to take land, could be derived from any other source than the supreme law-making power of the state.

Railroads are declared to be designed for the public accommodation, like other highways, and therefore to be public; and it is said that being public highways, they can be laid out, built, maintained and put in operation only by virtue of grants of the legislature or of authority derived from them. They are required, in times of war, insurrection or invasion, to transport soldiers, munitions of war and other property of the state, as well as soldiers, munitions of war and other property of the United States, and the mails of the United States, at such rates as the governor and council shall impose, if the parties do not agree. They are forbidden to discontinue their roads and required to keep them in good repair, and discharge their duties in carrying passengers and

freight agreeably to their proper object and purpose: Gen. Stats., chs. 145, 146. Besides, their charters are always carefully guarded to prevent an inference that they are not the creatures of the state, charged with public functions and subject to legislative control. Undoubtedly a legislative declaration that a given use is public cannot be regarded as conclusive to all intents without denying the power of the court to interpret the constitution; nevertheless, it is true that the creator of a thing may generally impose upon the work of his own hands such qualities and characteristics as he chooses, and when we see that the legislature, in establishing railroad corporations, has always been so careful, not only to bestow upon them attributes and powers consistent with no other idea than that their purpose is public, but to lay upon them also obligations and duties which would be clearly unjust and arbitrary in any other view; and when, in addition to this, we find the statutes full of declarations that the use is a public use, it would seem that nothing which falls much short of absolute demonstration would warrant the court in holding that the use is after all private.

Thus far, indeed, the cases all agree. It is nowhere contended and is not contended by the plaintiffs that a railroad is not a public use in such sense that land, the private property of individuals, may be taken for its construction. But a strenuous effort has been made to distinguish between the nature of a public use that warrants the exercise of the power of eminent domain, and that which warrants the exercise of the taxing power in its behalf. Of course the use which warrants the taking of land for a road-bed must be public, otherwise every charter granting that right and every general law recognising its existence and regulating the mode of its exercise has been nothing less than an arbitrary and despotic interference by the legislature with private rights of property in flagrant violation of art. 12 of the Bill of Rights, as well as the other provisions of the constitution, whereby those rights are secured.

The argument, then, admits that the use is public, but holds that it is not sufficiently public, or is not public in the particular way to bring it within the category of objects for which taxes may be imposed; either in degree or kind the public quality which it confessedly possesses falls short of that required by the constitution to justify an exercise of the taxing power. It is incumbent on those who undertake to maintain this distinction to point out

clearly the differences on which it rests. An assertion that it does exist is not enough, nor is the argument advanced by a repetition of such assertion, even though made in confident and emphatic terms. What is the rule wherewith we are to determine when a given public use is of a character to warrant the exercise of one power and not the other? What is the principle to be applied? No one will contend that the power of eminent domain, and the taxing power, though similar, are in all respects identical, but all agree that neither can be exercised except for a public end. Which is the higher power, or, in other words, which requires the greater public exigency to call it forth? What is the nature of those objects which lie on one side of the line, and what of those upon the other side? Where is the line to be drawn and what are the reasons that determine its location? These are some of the questions not to be evaded, or met with much speech and ingenious ratiocination, but to be answered fairly and clearly, before a court can say that the legislature have beyond all reasonable doubt transcended their constitutional powers in declaring that a use which is of such character, that is, public in such sense that private property may be taken and appropriated in its behalf, is also a public use in such sense that taxes may be levied in its behalf.

In those cases to which we have been referred by plaintiffs' counsel, where an attempt to do this is made, it does appear to me the failure has been rendered only more conspicuous by the eminent ability of those who have undertaken the task; and after a most careful examination of those cases, if we were to hold that a railroad, being a public use for which the land of individuals may be taken against the owner's consent, is not a public purpose for which taxes may be imposed, I should be utterly at loss what sound reason to give for the distinction, or in what terms to frame a rule to govern the future action of the legislature in cases of a like description.

Unless the court are to stand between the people and their representatives, and declare when the latter have misjudged in their deliberations, and set up limits to the legislative powers of the general court not found in the organic law of the state, it is clear to my mind that this law cannot be annulled by a judicial sentence or decree.

SMITH and RAND, JJ., delivered opinions in concurrence.

Supreme Court of the United States.

MUTUAL BENEFIT LIFE INSURANCE CO. v. HATTIE B. TISDALE.

In a suit by an executor or administrator, the letters testamentary are admissible in evidence and are conclusive of his right to sue.

But in an action between strangers, such letters are not admissible as evidence of the death of the decedent.

In an action by a wife upon a policy of insurance on the husband's life in her favor, letters of administration to her upon his estate are not evidence of the husband's death.

In error to the Circuit Court of the United States for the District of Iowa.

This action was brought upon a policy of insurance, issued to Mrs. Tisdale upon the life of her husband. Evidence was given tending to show the death of Mr. Tisdale on the 24th of September 1866. This evidence consisted chiefly in the sudden and mysterious disappearance of Mr. Tisdale, under circumstances making probable his death by violence. Evidence was given by the defendant tending to show that he had been seen alive some months after the date of his supposed death.

To sustain her case the plaintiff offered in evidence letters of administration upon the estate of her husband, issued to her by the county court of Dubuque county, Iowa. The defendant objected to the admission of this evidence. The objection was overruled and the letters were read in evidence, to which the defendant excepted.

In the charge of the judge, he said: "The real question is whether Edgar Tisdale was dead at the time of issuing the letters of administration. It is incumbent on the plaintiff to prove that fact. She has shown as evidence of that fact letters of administration issued to her as administratrix by the probate judge. It is the duty of the court to instruct you that this makes a *primâ facie* case for the plaintiff, and changes the burden of proof from the plaintiff to the defendant. * * * Without contradictory evidence, these (the letters of administration) give the plaintiff the right to recover." To the charge in this respect the defendant excepted.

The opinion of the court was delivered by

HUNT, J.—In an action brought, not as administrator, but in an individual character, to recover an individual debt, where the right of action depends upon the death of a third party, to wit, an

insurance upon his life, do letters of administration upon the estate of such person, issued by the proper probate court, afford legal evidence of his death? This is the question we are called upon to decide. It is presented sharply, and is the only question in the case.

The authority in favor of the admission of the letters as evidence of the death of the party, in a suit between strangers, is a general statement to that effect in 1 Greenl. Evid., § 550. The cases cited by the writer in support of the proposition are *Thompson* v. *Donaldson*, 3 Esp. 64; *French* v. *French*, Dickens 268; *Hamblin's Case*, 3 Rob. La. Rep. 130; *Jeffers* v. *Radcliff*, 10 N. H. 245. In the case first cited the authority does not support Mr. Greenleaf's statement. It was held that the letters did not afford sufficient proof of death, and, no further evidence being given, the verdict was against the claimant. In *French* v. *French* the court held in terms against the theory that the letters were evidence of death, "but under all the circumstances admitted the probate as evidence of death." This case was that of a bill filed by an heir against one in possession of the estate, and in that case Mr. Greenleaf hardly contends that the letters are evidence of death. In *Tisdale* v. *Con. Life Ins. Co.*, 26 Iowa 177, and in the same case in 28 Iowa 12, cited by the defendant in error, the law was held as claimed by her. The other cases cited by the defendant in error, including *Hamblin's Case*, are those where the administrator or executor was a party to the suit in his representative capacity, in relation to which a different rule prevails.

In the New Hampshire case above cited there was evidence to sustain the ruling independently of the letters, and the case concedes that the law is otherwise in England, and bases itself upon the peculiar organization of the courts of that state.

On the other hand, the text-writers—Phillips on Evidence, vol. 2, p. 93, m, ed. 1868; Tamlyn, 48 Law Library 154, referring to *Moons* v. *Des Barnalles;* Hubback on Succession, 51 Law Library 162—concur against the rule laid down by Mr. Greenleaf.

In *Moons* v. *Des Barnalles*, 1 Russell 307, it was held that letters of administration were not *primâ facie* evidence of death, and the defect was supplied by other evidence. Lord ELDON says, in *Clayton* v. *Graham*, 10 Ves. 288, that it is the constant practice to require proof of death, and that probate is not sufficient. In *Leach* v. *Leach*, 8 Jur. 211, Sir KNIGHT BRUCE refused to order

the payment of money upon letters alone, but required other evidence. In *Blackham's Case*, 1 Salk. 290, it was held that the sentence of the spiritual court in granting letters is not evidence upon any collateral matter which would have prevented the issuing of the letters.

In speaking of judgments *in rem*, and where the judgment may be evidence against one not a party or privy to it, Mr. Starkie says: "This class comprehends cases relating to marriage and bastardy where the Ordinary has certified sentences relating to marriage and testamentary matters in the spiritual court:" 1 Starkie on Evid. 372, m. What is meant by this is explained at a subsequent place, where he says: "The grant of a probate in the spiritual court is conclusive evidence against all as to the title to personalty, and to all rights incident to the character of an executor or administrator:" p. 374, m. He cites in support of this statement the case of *Allen* v. *Dundas*, 3 Term Rep. 125, that payment of money to an executor who has obtained probate of a forged will is a discharge to the debtor. The grant is conclusive in all business transacted as executor, and concerning the duties of the executor, that it was properly made.

This accords with the principle hereafter laid down.

The chief ground of argument to admit letters testamentary as evidence of the death of the party, is that the order of the probate court issuing them, is an order or judgment *in rem*. But a judgment *in rem* is not *primâ facie* evidence; it is conclusive of the point adjudicated unless impeached for fraud: 1 Starkie on Evid. 372, m; Freeman, *infra*. If admissible on this principle, the letters were conclusive evidence of the death of Tisdale. But this is not claimed by any argument.

Again, the probate court has never adjudicated that Tisdale was dead. Death was not the *res* presented to it. Shall Mrs. Tisdale receive letters testamentary? was the *res*, and upon that only has there been an adjudication: Hubback, *supra*, 162, m.

The letters testamentary issued to an administrator by a probate court, as a general rule, are evidence only of their own existence. They prove, that is to say, that the authority incident to that office or duty has been devolved upon the person therein named; that he has been appointed, and that he is executor or administrator of the party therein assumed to have departed this life. Different states have different provisions as to who may be executor or ad-

ministrator, excluding some persons and preferring others, in the order and manner in their statutes specified. Thus, persons convicted of infamous crime are excluded from this office, and persons of notoriously evil lives may be passed by, in the discretion of the probate court. Sons or daughters or widows are entitled to take in preference to others; unmarried women are entitled in preference to married women. Certain notices may be, and usually are, required to be given of the proceedings to obtain letters testamentary. On all this class of subjects the letters are the evidence that the proceedings have been regularly taken, and that the person or persons therein named are those by law entitled to the office. Upon these points the court has adjudicated. No proof to the contrary can be admitted in an action brought by the executor as such. Parties wishing to contest that point, must do it before the probate court, at the time application is made for issuance of the letters, or upon subsequent application, as the case may require.

In an action brought by such executor or administrator touching the collection and settlement of the estate of the deceased, they are conclusive evidence of his right to sue for and receive whatever was due to the deceased. The letters are conclusive evidence of the probate of the will. It cannot be avoided collaterally by showing that it is a forgery or that there is a subsequent will. The determination of the probate court is upon these precise points and is conclusive: 2 Smith's Lead. Cas., 6th Am. ed., 669; *Vanderpool* v. *Van Valkenberg*, 6 N. Y. 190; *Collins* v. *Ross*, 2 Paige 396; Freeman on Judgments 507, citing numerous cases.

If the present suit were brought by the plaintiff as executor or administrator to collect a debt due to her deceased husband or to establish a claim arising under a will, of which probate had been made by her, she would have been within these rules. The letters testamentary would not only have been competent evidence, but they would have been conclusive of her right to maintain the action, and unimpeachable except for fraud.

Such, however, is not the case before us. The suit is by the plaintiff as an individual, to recover a debt alleged to be due to her as an individual. It is a distinct and separate proceeding, in which the question of the death of the husband comes up collaterally.

The books abound in cases which show that a judgment upon the precise point in controversy cannot be given in evidence in

another suit, against one not a party or privy to the record. This rule is applied not only to civil cases, but to criminal cases and to public judicial proceedings, which are of the nature of judgments *in rem.*

If an indictment for an assault and battery by A. upon B. is prosecuted to a conviction, the judgment for some purposes is conclusive evidence. Thus, upon a subsequent indictment for the same offence, it would be conclusive in favor of A. that he had been once tried for the same offence and convicted, and that he could not again be put in jeopardy therefor. But if A. sues B. for the same assault and battery, it cannot be doubted that it would be incompetent to introduce the record in the criminal case as evidence of the offence. For this purpose it is "*inter alios acta.*" B. was no party to that proceeding. In theory of law he was not responsible for it or capable of being benefited by it: 1 Starkie on Evid. 317, m.

So, if B. should afterwards be indicted for an assault upon A., arising out of the same transaction, the record would not be competent evidence to show that A., and not B., was in fact the offending party.

In some states provision is made for the admeasurement and setting apart of dower to the widow of a deceased person. Officers are appointed for this purpose, who make their certificate awarding particular property to her use, and file their report in the proper office. Although this certificate is judicial in its character and assumes that the deceased had title to the property described, and the certificate is valueless except upon that supposition, it has still been held that it is no evidence of title, and that the title must be proved as in other cases: *Jackson* v. *Randall,* 5 Cowan 168; *Same* v. *Ely,* 6 Id. 316.

It has been held that a comptroller's deed for the non-payment of a tax due the state is not even *primâ facie* evidence of the facts giving him the right to sell, such as the assessment and non-payment of the tax, although they are recited in the deed and this deed is in compliance with the statute. These facts must have existed to give a right to sell, but they are not established by the deed. They must be made out by independent proof: *Tallman* v. *White,* 2 N. Y. 66; *Williams* v. *Peyton,* 4 Wheat. 77; *Beekman* v. *Bigham,* 5 N. Y. 366.

A certificate of naturalization issues from a court of record when

there has been the proper proof made of a residence of five years, and that the applicant is of the age of twenty-one years and is of good moral character. This certificate is, against all the world, a judgment of citizenship, from which may follow the right to vote and hold property. It is conclusive as such, but it cannot, in a distinct proceeding, be introduced as evidence of the residence or age at any particular time or place, or of the good character of the applicant: *Campbell* v. *Gordon*, 6 Cranch 176; *Stark* v. *Chesapeake Ins. Co.*, 7 Id. 420.

The certificate of steamboat inspectors, under the Act of Congress of 1852, is evidence that the vessel was inspected by the proper officer, but it is held that it is not evidence of the facts therein recited, when drawn in question by a stranger, although the officer was required by law to make a return of such facts: *Erickson* v. *Smith*, 2 Abb. Ct. of App. N. Y. 64; 38 How. Practice 454.

So it has been held that where a sheriff sells real estate, giving to the purchaser a certificate thereof. Although there can lawfully be no sale unless there be a previous judgment, and although the sale is based upon and assumes such judgment, and although the law requires the sheriff to give such certificate, the recital by the sheriff of such judgment furnishes no evidence thereof. It must be proved independently of the certificate: *Anderson* v. *James*, 4 Rob. Sup. Ct. 35.

So, on an application by a wife for alimony, pending a divorce suit prosecuted against her, the fact that her husband has recovered a verdict against a third person for criminal connection with her, has been held not to be even presumptive evidence of her guilt: *Williams* v. *Williams*, 3 Barb. Ch. 628.

Authorities of this nature might be greatly extended. Enough has been said to demonstrate that neither upon principle nor authority was it proper, in the individual suit of Mrs. Tisdale against a stranger, to admit letters of administration upon the estate of her husband as evidence of his death.

The judgment must be reversed and a new trial had.

On the general subject of the conclusiveness of the judgment of a probate court and its effect on third parties, see *Roderigas* v. *East River Savings Inst.* and note, *ante*, p. 205.—ED.

United States Circuit Court, Northern District of Illinois.

ESSEX COUNTY NATIONAL BANK v. BANK OF MONTREAL.

It is the duty of a bank to whom a check is sent for collection to present it and demand payment within the time prescribed by law, and if not paid notify the proper parties of its dishonor.

A bank upon whom a check is drawn is liable, before acceptance, only to the drawer; it cannot be made liable to the holder except by its own consent.

If a bank to whom a check is sent for collection, instead of demanding immediate payment, accepts a certification of it, that will create such a new relation between the parties as to discharge the drawer, and will render the bank accepting the certification in lieu of payment, liable for any loss arising to the holder from the failure of the bank upon which the check was drawn.

The party to whom the check is endorsed for collection, is the proper plaintiff, and an amendment, under the practice in Illinois, is allowable at the trial, substituting such party as plaintiff.

THIS was an action to recover from defendant the amount of a check sent to it for collection. The facts sufficiently appear in the opinion.

Hitchcock & Dupee, for the plaintiff.

Dexter & Smith, for the defendant.

HOPKINS, J.—P. Becker & Co., of Chicago, on the 3d day of August 1875, sent their check on the State Street Savings Bank to T. B. Peddie & Co., of New York, for $856.37. It was endorsed by the payees to the plaintiffs and by the plaintiffs was endorsed to the German-American Bank, New York, for collection, and by that bank in the usual course of business was endorsed to the Bank of Montreal, of Chicago, the defendant, for collection. It belonged to the plaintiff in this case, but the plaintiff having no correspondent or agent in Chicago, it employed the German-American Bank to collect it, and that bank employed the defendant, according to usage among banks located at different points. The Bank of Montreal received the check about 11 o'clock on the morning of the 9th of August, and soon thereafter sent it by its messenger to the State Street Savings Bank for payment. The messenger presented it at the counter to the teller, who informed him that the cashier was not then in, and that he could not pay it in his absence. The messenger took the check away, and later in the day called again with it and presented it to the same party again, and he made the same reply, that the cashier was out, and

he could not pay it until he came in. The messenger then asked the teller to certify it, which he did in the usual mode of certifying checks by that institution, and thereupon the messenger took the check away with him. The teller, when he certified the check, charged the amount of it up to the drawer's account, which then exceeded the amount of the check, and credited certificate account with amount of the same. The defendant also sent the check for payment on the next day at about 11 o'clock, and it was not paid because the bank had not the funds to pay it. The bank kept its doors open during all of the 10th of August, but had not the funds to pay the check, and failed to open after that day. The testimony is not very clear as to whether the bank had currency enough on the 9th to pay the check, if payment had been insisted upon, but as this point is not material in the view I have taken of the law of this case, I shall not stop to settle it; when it was presented after certification it was not paid because the bank was insolvent.

The defendants had the check to collect. It was transmitted to them for that purpose, and their duty as collecting agents was to present and demand payment within the time prescribed by law, and, if not paid, notify the proper parties of its dishonor. If that had been done, the rights and remedies of all parties liable upon it, when it came into their hands, would have remained intact. If loss occurs by the acts or omissions of the party thus assuming the duty of collection, it should fall upon the delinquent agent, not upon the absent overseer.

The State Street Savings Bank was not liable to the holder of the check without acceptance. It was liable before acceptance only to the drawer: *Chapman* v. *White*, 6 N. Y. 412. It could not be made liable to the holder of the check except by its own consent. It had the funds of the drawers, and according to the usual course of dealing with its customers, was under obligation to pay on demand all checks drawn upon it by them, but a refusal to do so would not give the holder of the check the right to sue the bank. The drawer in such case would be liable, and he could sue the bank immediately, without redeeming the check, and the bank would be liable for damages for its refusal to perform its undertaking with him as depositor: *Merchants' Bank* v. *State Bank*, 10 Wall. 604, 605; *Bank of Republic* v. *Millard*, Id. 152.

This being the law, the duty of the defendant upon receipt of the check for collection was plain. It was to present it for pay-

ment, and only for payment. This it did at first, and if it had stopped then there would have been no liability upon it. But it did not; it went farther; it asked for and received the certification of the bank upon the check. By this act a new relation was created between the parties. The amount the check called for was withdrawn from the drawer's account and control, and thereafter they had a right of action for it against the bank. The technical operation of the transaction was a transfer to the holder of the check of the drawer's funds and right of action against the bank. It superseded the previous rights and obligations of the parties, particularly of the drawers.

Before that, the drawers could have stopped payment of the check or withdrawn the funds by other checks. After the certification they had no control over the funds or action of the bank in reference to it, nor any right to sue the bank for it. Nor did the bank owe them any duty in relation to it. It no longer possessed the character of a check. If the drawers had taken it up before its certification it would have been useless, but after that they could only get the money by surrendering it. It resembles, after certification, more the certificate of deposit than a check. Now, what was the effect upon the legal rights and liability of the drawers? Did it not discharge them from all further liability upon the check, and if such should be found to be the consequence, does it not follow that the defendants are liable to the owners for the amount? If they have by their acts released the responsible drawers whereby the instrument is made worthless, why shall they not make good the loss?

In *Smith* v. *Millard*, 43 N. Y. 176, it is said that presenting a check for payment and accepting a certificate as good is equivalent to payment. In Morse on Banking, p. 282, it is laid down that, if the holder chooses to accept the bank's certification, no matter to suit whose convenience, there can be but one result. The promise of the bank on the drawer's account, accepted as satisfactory by the creditor, discharges the debtor, and by the same action deprives him of all further concern in the premises. The bank no longer owes him any duty which he can enforce, or for the breach of which he can sue. If this is the result of the act of the defendant in accepting the certification of the check, it would seem too clear for discussion that the defendant had incurred a liability to pay the amount of it to its principal. The drawers being re-

leased by the certification, and the bank being unable to pay, it follows irresistibly that the plaintiff is entitled to recover of the party releasing the drawers, whereby the amount of the check is lost to them.

It was claimed on the part of the defendant on the trial that the plaintiff must show some damages by the act. If the act released a responsible party that would be damage enough. But the law presumes damages from the negligence or unauthorized act of a collecting agent of commercial paper whereby any party to it is released or not charged: *Commercial Bank of Albany* v. *Hughes*, 17 Wend. 94. And if this presumption is not conclusive, but liable to be overthrown by proof to the contrary, it is the duty of the party at fault to show clearly that no damages did result to the holder of the paper from their negligence, which in this case the defendant did not do. It did not clearly show that the check would not have been paid on the 9th of August if payment had been insisted upon. I think the only safe and maintainable doctrine in this case is that the defendant assumed the risk of payment by the bank when it accepted the certification, and if the bank did not pay then they must. In laying down this rule I assume that the certificate operated as a release or payment as to the drawers, and that they were no longer liable upon the paper. This release I regard as the pivotal point in this case, and upon that point I am not forced to rely upon my own judgment. I find the precise question has been decided by the Court of Appeals of New York in the case of *The First National Bank of Jersey City* v. *Leach*, 52 N. Y. 350. That was an action on a check drawn by defendant on the 21st of November 1871, on the Ocean National Bank, payable December 12th 1871. The bank, the plaintiff in that case, discounted it for the payee, and at eleven o'clock A. M., on the 12th day of December, they presented it to the Ocean Bank, and got it certified as good. The drawer then had an account there sufficient to pay it, which was on the certification charged up to him on the Ocean Bank books. Within an hour after that the Ocean Bank suspended. The check was again presented on that day for payment, and was duly protested for non-payment. The bank then sued the drawer to recover the amount of it. The court upon that state of facts held that the plaintiff could not recover; that the certification operated as a payment as between the holder and drawer.

In the opinion it is said that "the law will not permit a check, when due, to be then presented and the money left with the bank for the accommodation of the holder without discharging the drawer." That if the holder chooses to have it certified instead of paid, he will do so at the peril of discharging the drawer.

But they say that "this would not discharge the drawer of a check who himself procured it to be certified and then put it in circulation; that the reason of the rule would not apply to him," and conclude the opinion by saying "that upon principle it must be held that the bank holds the money after certification by request of the holder, not at the risk of the drawer, but of the holder of the check."

This is the only direct authority I have found upon this question, from which I judge that the practice of holders of checks getting them certified is not very usual, for if it were, other cases would have found their way into the books and come under judicial consideration.

The defendant on the trial cited *Bickford* v. *First National Bank of Chicago*, 42 Ill. 23, and *Rounds* v. *Smith et al.*, Id. 245. From an examination of those cases, I do not see that they conflict with the case of *Bank* v. *Leach*, 52 N. Y., *supra*. In those cases the checks were certified at the request of the drawer before delivery. This expressly appears in the last case, and the judge in his opinion in that says, "the case in all its important features is the same as *Bickford* v. *Bank*," so that I must assume that the checks in both these cases were certified by request of the drawer, which presents an entirely different question from this, and leaves the point involved here unconsidered in those cases.

In *Brown* v. *Lecker et al.*, 43 Ill. 497, cited by the defendant's counsel, the check was also certified by the request of drawer before it was passed by him, so that the reasoning of the court in that case was not predicated upon the same facts as appear here. But, as I understand those cases, that court holds that a check operates to transfer the amount named in it to the payee, and authorizes him to sue for and receive it from the bank. If such is the doctrine of that court, I am not at liberty to follow it, for the Supreme Court of the United States, in *The Bank of the Republic* v. *Millard*, 10 Wallace 152, has decided differently. And as the question involved is one relating to commercial securities, and belongs to the domains of general jurisprudence, this court is not bound by

the decision of the state courts where the matters arise: *Township of Pine Grove* v. *Talcott*, 19 Wallace 666. But, waiving this view and difference between the courts on this point, I do not think that the decision of the learned court of Illinois above referred to, when carefully examined, will be found to touch the point involved here. It was not before that court in either of those cases, and although the general language used might seem to be in conflict with the conclusions I have reached in this case, still when read and considered as used in reference to the fact and question before that court, no conflict or discrepancy of opinion will be found to exist. Those cases are clearly distinguishable on the facts from this case, and are, therefore, not authority upon the point involved here. I am therefore of the opinion that the defendant is liable for the amount of the check, with interest from the certification, as by its certification the drawer was discharged.

A question was suggested as to the right of this plaintiff to sue the defendant, as it was not its agent, alluding to the recent decision of the Supreme Court of the United States in *Hoover, Assignee, &c.*, v. *Wise et al.*, vol. 8 Chicago Legal News, page 193, but it was stated, and not disputed, that the plaintiff's attorneys had authority to sue in the name of the German-American Bank, as well as in the name of the present plaintiff, the real owner, and it was claimed that an amendment under the laws of the state was allowable, in the discretion of the court, by inserting the name of the German-American Bank as plaintiff in lieu of the present plaintiff. And as a decision making the change necessary has been announced since the commencement of the suit, and as no injury can result, as it appears to the court, to the defendant thereby, I direct and allow an amendment in that respect by striking out of the process and pleadings the name of the present plaintiff and inserting in lieu thereof the name of the German-American Bank, and, as so amended that judgment be entered for plaintiff and against defendant for $882.76, the amount of the check and interest, with costs of this suit to be taxed.

Supreme Court of Maine.

ELLA E. McLEERY *v.* SALLY McLEERY.

A father died, leaving a widow. His homestead descended to his two sons. In consideration of their having the use and income of the whole estate, the sons, in writing, promised the widow an occupancy of a portion of the premises, and certain farm stock for her use, and a certain yearly payment. Afterwards, one son conveyed to the other. The latter then conveyed the entire premises to his mother by a warranty deed. Then he died, leaving a widow. In an action of dower by the widow of the son, against the widow of the father, it was *held*—

1. That the agreement between the sons and the mother, did not operate either as an assignment of dower to her or as a release of dower by her.

2. That the condition of the senior widow, as to her own dower, is the same, essentially, as if it had been specially assigned to her.

3. That her right of dower was not extinguished by merger in the fee conveyed to her by her son.

4. That she is not estopped by the covenants of warranty in such deed from availing herself of her right of dower in this action; inasmuch as such right was paramount to and independent of the title procured by the deed.

5. That there are two dowers in the estate; the senior widow having one-third of the whole, and the junior widow one-third of the remaining two-thirds, as dower; and that the junior widow is not now, nor will she be at the death of the senior widow, dowable in any greater proportion thereof.

ACTION of Dower. Referred to the full court on a case stated.

S. Belcher, for plaintiff.

Philip H. Stubbs, for defendant.

PETERS, J.—William McLeery was seised of the messuage described in the writ. At his death, the tenant, who is his widow, became entitled to dower in it. Subject to her right of dower, the estate descended to his two sons. One of the sons, the husband of the demandant, acquired his brother's interest in the estate, thus owning the whole. At his death, his widow also became entitled to dower. Both husbands are dead and their wives survive. Here, then, two widows are dowable in the same estate. Their respective rights were as follows: The tenant (wife of the father) having the older title in dower, would have for her dower one-third of the whole. The demandant (wife of the son) being the younger widow, would have one-third of the remaining two-thirds of the estate. Thus, the tenant would have three-ninths, and the demandant two-ninths thereof. This result comes from the principle established in the familiar maxim of ancient origin, that

"dower ought not to be sought from dower." Nor will the junior widow be dowable in the one-third that may be assigned to the senior widow, upon the death of the latter; and for this reason. In order to recover dower, she has to count upon her husband's seisin. But during his lifetime he had no seisin of the one-third, which goes to his mother as dower. When his mother's dower is assigned to her, she partakes seisin therein by relation from her husband, continuing his seisin, and to that extent defeating the seisin of the son, who in such one-third has only a reversion. Had the son received the title of the estate from his father by deed, and not by descent, the rule would be otherwise. In such case the son would have had a seisin in his lifetime of the whole estate, sufficient to give his wife dower in the two-thirds during his mother's lifetime, and in the whole estate when the mother's title to dower ceased: *Geer* v. *Hamblin*, 1 Maine 54; *Brooks* v. *Everett*, 13 Allen 457; 4 Kent's Com. 64. See also, under appropriate heads, Washburn's Real Estate and Scribner on Dower, for a more particular elucidation of the principles stated.

But the question arises, whether the demandant may not be dowable in the whole estate, instead of two-thirds thereof, upon the ground that the title of the elder widow to dower has been in some way extinguished or lost. And this is claimed by the demandant to be the case from several causes.

First, she contends that the paper given by the sons to the mother has that effect. And upon the other hand, the tenant claims that her acceptance of the paper amounted to an assignment of her dower. But our opinion is that the agreement had neither the one effect nor the other. It neither assigned dower, nor extinguished it. It was not an extinguishment of dower, because there is no release or conveyance under her hand or seal, nor does she in any way design or attempt to surrender her right. Nor would it operate as an assignment to her of her dower. A portion of the consideration to her in the agreement consists of the executory promises of the sons, which may never be fulfilled. The agreement (not signed by her) merely related to "the use and income" of her dower by the sons until set out to her. It operated only to suspend her claim for a time: *Sargent* v. *Roberts*, 34 Maine 135; *Austin* v. *Austin*, 56 Id. 74.

Then a question arises, whether the demandant may not have dower in the whole estate until the dower of the tenant has actually

been assigned to her. It is held by text-writers, and is so decided generally, that the maxim *dos de dote peti non debet* does not apply when there has not been an actual assignment to the first widow. This is upon the principle that the husband of the second widow may be considered as seised in his lifetime of the estate charged with the right of dower of his mother, as against all others but her. A stranger cannot avail himself of the contingency that the first widow may never enforce her right. When she does enforce it, then an assignment already made to the second widow becomes wholly defeated or diminished thereby: *Dunham* v. *Osborn*, 1 Paige 634; *Reynolds* v. *Reynolds*, 5 Id. 161; *Safford* v. *Safford*, 7 Id. 259. To the same effect are the cases cited *supra*. See also *Young* v. *Tarbell*, 37 Maine 509. But the answer to this position is, that the rule does not apply to this case. The tenant is not a stranger. She is in possession, claiming her estate of dower. Her condition is the same essentially as if a special assignment had been made to her. There is no need of a separation of her estate in dower, from her estate of inheritance, for any practical purposes. She does elect to enforce her claim, by a resistance to the claim of the second widow. If the demandant should recover according to her claim, the tenant might perhaps have an action against her to recover a part of it back again. We think the legal rights of the parties can be as well settled in the present action as in any other way.

Then it may be argued that the tenant's right of dower has been lost by consolidation with the fee conveyed to her by her son. In *Leavitt* v. *Lumprey*, 13 Pick. 382, it was decided that a second widow was not entitled to dower in the whole of an estate against the tenant to whom the senior widow had conveyed her right after she had recovered judgment for dower therein, but before it was set off to her. While in *Atwood* v. *Atwood*, 22 Pick. 283, it was held that a prior right of dower which had been released to the tenant before any suit to enforce the same, could not be set up to diminish the claim of a second widow who claimed dower in the whole estate. But we have already expressed the opinion that in the case at bar the senior widow is in the same condition and bears the same relation with all parties interested as she would if her dower had in point of fact been set out to her. She is entitled to a life-estate of one-third. She is in actual possession of it as well as of the reversion, and she is defending her possession. In this

state the doctrine of merger is not favored in law or equity. It is clear enough that if this was a proceeding in equity a merger could not be regarded as taking effect. It is manifestly for the interest of the tenant to keep her two titles distinct, in order that the demandant may recover no greater amount of dower than she would have been entitled to if they had continued to be held by different persons. The tendency in the courts has been to admit the application of the same principle, in proceedings at law in cases where the forms of the transfers are such that it can reasonably be effectual. The tenant having all of the estate, including her right of dower therein, may certainly be regarded as having her estate of dower as effectually as if she had recovered judgment therefor. She cannot sue herself to obtain it. She has it. Having the whole estate, she has all the parts: *Campbell* v. *Knights*, 24 Maine 332; *Holden* v. *Pike*, Id. 427; *Simonton* v. *Gray*, 34 Id. 50; *Strong* v. *Converse*, 7 Allen 557; *Savage* v. *Hall*, 12 Gray 365.

The point, however, upon which the demandant places the greatest reliance and stress, is that the tenant is barred from her claim of dower, upon the technical ground of estoppel. It is contended that, by accepting from her son a deed of the premises with the usual covenants of warranty, she admitted that he was fully seised of all the premises as of fee, and the argument is that she is now estopped to show the contrary. In support of this view, *Lewis* v. *Meserve*, 61 Maine 374, is cited for authority. The tenant admitting *Lewis* v. *Meserve* to be correctly decided, denies that it can apply to a case like the one at bar. We think the distinction is well taken. That case was decided with exact correctness, having reference to the actual question then before the court for their determination. There it appeared that the tenant who resisted the claim of dower, obtained *all* his title from the husband of demandant, and there was no pretence that he had any kind or claim of title from anybody else. He merely set up that some one else might have a title paramount to his. But he had no relation with it, if it was so. The court were clearly of the opinion that he was estopped to deny the seisin of his own grantor, who was the husband of the demandant in that suit. All the cases are in accord as far as that case goes. The point is there briefly alluded to, the decision of it not being really necessary to the result of the case. But the present case is a different one. Here the tenant does claim a title of dower outside of and superior to

the right and title of her grantor. She had no occasion to purchase what already belonged to her, nor is it to be supposed that there was any design by her to do so. Her grantor had already acknowledged and submitted to her superior claim. The reasonable presumption is that she paid for the premises, deducting from the price for the entire premises the value of what was already her own. It would seem hard and inequitable that the mere form of the instrument of conveyance should have the effect to deprive her of a valuable interest and right which she already possessed. Such a result was undoubtedly never dreamed of by the parties concerned when the conveyance was made. Nor does the law require it to be so. We are aware that there have been contrary decisions upon the point presented. Nor is there a satisfactory consistency upon it in the decisions of our own state. But we regard the opinion in the leading and important case of *Foster* v. *Dwinel*, 49 Maine 44, as a settlement of the question so far as the rights of this tenant are concerned. That case has been much commended by several text-writers since it was promulgated, and believing that the arguments and conclusions of the court therein are based upon sound logic and good sense, we see no good reason why it should not be adhered to in a state of facts like those presented in the present case: Bigelow on Estoppel 71; 2 Scribner on Dower 227.

Judgment for demandant for her dower in two-thirds of the premises described in the writ.

APPLETON, C. J., WALTON, BARROWS, DANFORTH and VIRGIN, JJ., concurred.

Circuit Court of the City of Richmond, Virginia.

W. B. DUNCAN AND P. C. CALHOUN, TRUSTEES, v. CHESAPEAKE & OHIO RAILROAD CO. ET ALS.

Employees of a defaulting railroad company are not to be considered as creditors at large of the company in regard to their claims for wages in arrears at the time of the appointment of a receiver for the company.

When mortgagees come into a court of equity seeking satisfaction of their claims against a railroad company by suit for foreclosure, they should be required to satisfy all arrearages of pay due employees out of the trust property or its future earnings.

THIS was a cause in equity, which came up on motion and was heard at the February Term 1876 of the Circuit Court of the City

of Richmond, on the report of the Hon. W. C. Wickham, receiver, asking the instructions of the court as to the disposition of the surplus earnings of the railroad, and requesting to be allowed to discharge the arrears of pay due employees prior to his appointment as receiver.

W. J. Robertson, *H. T. Wickham* and *W. H. Hogeman*, for receiver, in support of the motion.

James Lyons and *J. A. Jones*, contrà.

Shipman and *Barlow*, *Larocque & MacFarland*, of New York, for complainants, assented to the motion.

WELLFORD, Circuit Judge.—Under orders heretofore entered in this cause, the court, in the interest of the creditors, has assumed control and administration through its receiver of all the franchises and property of the Chesapeake and Ohio Railroad Company. That company was successor to the Virginia Central Railroad Company, and in succeeding to all its franchises and rights of property, assumed all of its outstanding obligations.

It is admitted that these franchises and property thus acquired *cum onere*, are abundantly sufficient to satisfy the creditors of the Virginia Central Railroad Company, and their claims are conceded to be paramount to those of any claimants under obligations of the Chesapeake and Ohio Railroad Company.

There appears to be no doubt that their claims will be paid to the full extent of principal and interest out of the property now under the control of the court.

These creditors have patiently forborne to press their rights, and being now entitled to payment of arrears of several instalments of interest, and some of them to payment of principal, may properly expect every reasonable consideration in the disbursement of any funds subject to the order of the court, as far as may be practicable, towards the satisfaction of their claims. But, unhappily for all parties to this cause, the immediate satisfaction of the most meritorious claims is altogether impracticable. My province is simply to determine how far it is practicable under the circumstances, and so far, to order that it shall be made.

The creditors of the Virginia Central Railroad Company, as well as all the creditors of the Chesapeake and Ohio Railroad Com-

pany, who are practically interested just now in any orders of this court, claim under obligations of those companies secured by several deeds of trust executed by the respective companies, conveying in very comprehensive terms all corporate franchises and rights of property. These deeds were frequently in common parlance and are sometimes in these proceedings styled mortgages, and I shall accept the phraseology, notwithstanding its inaccuracy.

It was a substantial part of all these mortgages that the custody, control and administration of the trust property should be left undisturbed in the hands of the railroad company, not merely until default in the terms of their covenants, but thereafter, until, in the intelligent discretion of the trustees, or upon the command of a large fractional representation of the bondholders, or in the judgment of a court of competent jurisdiction, such custody should be changed.

The character of the security offered for the investments asked by the corporation in placing its bonds upon the market, made this provision of the mortgages a most essential element of the contract. Each mortgage contemplated an indefinite number of *cestuis que trust*, varying in amount of interest and subject as to persons and amount to all the fluctuations of the money market. The security tendered was not to be measured in its value by the probable result of any every-day sale under the hammer of the auctioneer. The great value of the security consisted in the importance of the franchise and the providence with which the money contributed for its development should be appropriated to the construction of a great inter-state highway, the accumulation of all necessary material for transportation of persons and property, and an economical and energetic prosecution of the work. The corporation was engaged in a great experiment, and upon the success of that experiment necessarily depended, to a great extent, the value of all its obligations. But it was a corporation based upon solid and substantial investments, to which millions of money had been contributed by the Commonwealth and several of the counties of Virginia and many individual citizens of Virginia and her sister states.

The value of all this investment of capital was at stake, and made subordinate by the mortgages to the value of the bonds. The guarantee of the intelligent and watchful self-interest of the stockholders, to ensure the success of the experiment, was therefore no inconsiderable element in the security of the bondholder.

It was not unreasonable to suppose that they would see to it that the administration of the road would be confided to officers of intelligence, capacity and providence, and that those officers, selected by the stockholders to protect their interests, would be not unsafe protectors of the paramount interest of the bondholders. The laws of the Commonwealth required the periodical selection of these officers, gave to every stockholder a voice in such selection, and measured the value of his voice in proportion to the value of his interest by a prescribed rule. But after their election, during their continuance in office in the interest of the great mass of the stockholders, the law protected them in the intelligent discharge of their responsible trusts from the interference of any inconsiderable fraction of the individual stockholders. It was in like manner, in all these mortgages, deemed necessary, in the interest of the great mass of the bondholders, to protect these officers against unnecessary and improvident interruption by a few impatient or capricious bondholders. For the protection of the bondholders, gentlemen of intelligence, position and character were designated in each mortgage as trustees, and large powers, to be exercised in their discretion for the benefit of the *cestuis que trust*, were conferred upon them. But that discretion was not left unlimited. Equally in the interest of the company as in that of the mass of the beneficiaries, the power to require the trustees, after default of the company, to enforce the trust, was studiously withheld from any single beneficiary or any inconsiderable number of the beneficiaries. Power was conferred upon the trustees in some of the deeds to act after default according to their own discretion to the extent of selling the trust property; but no such sale could be made without advertisement for such length of time in advance as would give full opportunity to any and all parties in interest to invoke the interference of a court of equity, and enforce the execution of the trust in subordination to its decrees.

In none of the deeds, however, was power given to the trustees, in advance of sale, to divest the control of the officers of the company at their own independent election. Such power was given in several of the deeds, certainly in that under which the complainants claim, but only in the contingency that the trustees should be so required by a prescribed number in interest of the beneficiaries.

Until the administration of the trust property was assumed by this court through its receiver, none of the trustees, in the exercise

of their discretion or in obedience to the command of the requisite number of *cestuis que trust*, ever suggested, in the discharge of their trust, the propriety of dispossessing the constituted officers of the company. The receiver of this court, under the orders of this court, acquired possession of the trust property only from those constituted officers.

All of these martgages, it will be observed, invited the investment of capital upon faith in the security of an uncompleted railroad, and every purchase of a bond involved upon the part of the purchaser a like confidence, to a certain extent, with that which the state in conferring the franchise, and the stockholder in investing his money, reposed in the executive officers of the company for the faithful and energetic discharge of the duties assigned to them by the fundamental law of the corporation. That duty involved the prosecution to a successful completion of the projected railroad, and as rapidly as it could be completed even partially, the administration and conduct of any completed parts as common carriers of persons and property, under all the obligations as such to the state and the public. In consideration of their paramount interest, the bondholders were invited to confide, and by their acceptance did confide, to the stockholders the selection of these officers, until, after default of the company, they might elect to enforce the trusts of the deeds.

In the meantime these officers, in the common interest of stockholder and bondholder, were charged with their grave responsibilities. To meet them, the subscriptions of stock having been exhausted, they could have in contemplation of all parties no possible means except the earnings of the road and the credit of the company, so far as it might with recorded notice of the liens of the bondholders be at all available.

Prior to any default of the campany in the payment of interest upon the bonds, it was not unreasonable to suppose that the credit of the company might be available with its officers for this purpose. But immediately upon default, publicity of the embarrassment of its finances was unavoidable, and after that default had continued a few months the company became simply a tenant at the will of the bondholders of all its corporate franchises and property. Thereafter the credit of the company could certainly not have been contemplated as adequate to the necessities of the officers

in charge in maintaining and preserving the value of the trust property.

What, then, had they to rely upon? Under the letter of the contract, upon nothing but the earnings of the road so long as it might be permitted to remain in their hands. But it certainly ought to have been contemplated, in making the contract, that this might prove to be an insufficient reliance. The earnings of the road were necessarily subject to the vicissitudes of trade and travel, and dependent upon the continued preservation, in despite of all accidents, of the continuity of its road and the regularity of its trains, and upon the confidence of the public in the providence and watchfulness of the officers charged with the control and management of the road in insuring all necessary and available safeguards against accident to life, limb or property.

That providence and watchfulness necessarily required the continual outlay of large sums of money in daily expenditures for purchase of material of every description and provision for anticipated emergencies all along its four hundred and twenty miles of track. It imposed the necessity of the employment of a small army of subordinates all along its roadway and in control of every moving train, to be controlled and directed by skilled and intelligent overseers. The laws of humanity, the police laws of two states, overriding all questions of pecuniary interest in stockholders or bondholders, forbade the relaxation of that providence and vigilance, whatever it might cost, for one instant of time.

These necessary supplies could not be purchased by the pound or the piecemeal from day to day. This army of employees could not be paid all along the roadway with the setting of every sun. Those who furnished the one were compelled to await the ordinary routine of auditing and settling the account, incident to every business of magnitude, and the employees had to await the arrival of some periodic pay-day. If the officers in charge of this road were under obligation to announce, upon offering to make every purchase and in engaging the services of every such necessary subordinate. that pay for such purchase or labor was to be forfeited at any moment when the bondholders might elect to arrest their administration of the road, it would have been manifestly impracticable to continue the operations of the road with any safety to the public for one single day after the right of the bondholders to take possession of the road had been consummate.

Were they under any such obligation? The contract did not command them to surrender possession to the trustees until required. They had no right of their own election, without the orders of the stockholders who had placed them in charge, to do so. Their duty under the law to the stockholders, and their duty under the contract to the bondholders, required them to retain possession. But if they were under any such obligation, it necessarily involved the impossibility of their continuing to conduct the road, and the unavoidable and immediate suspension of all trade and travel along its track. To say nothing here of the breach of faith to the Commonwealth which conferred the franchise, and the great inconvenience to the public in whose interest the franchise was granted, such a suspension would have necessarily impaired immensely the value of the security of all the bondholders.

It appears from the record of this case that the officers of the Chesapeake and Ohio Railroad Company were placed in this dilemma. There is certainly nothing now before me which requires any censure of their conduct under these embarrassing circumstances. I have only occasion to consider that matter, however, so far it may affect the rights of those who dealt with them under these circumstances as the representatives of all parties interested in the franchises and property.

There can be no difficulty in rejecting any claim upon the funds under control of the court, preferred by any parties who can properly be regarded as creditors at large of the Chesapeake and Ohio Railroad Company, however meritorious the consideration upon which their claims against the said company may be based. Even if there be material furnished by any such creditors now in the daily use of the receiver, if such material were furnished on the credit of the company, any claim on account thereof must, in the absence of any lien retained by the special contract or reserved by the law, be subordinate to the recorded lien of the mortgages.

But can the claims of the employees of the company for arrearages of pay, or the comparatively small class of claimants referred to in the third clause of the receiver's report,[1] be properly regarded

[1] The following is the part of the report referred to :—

"III. There is a class of claims which it is proper that I should bring to the notice of your honor, arising from the purchase of material for the use of the road in the month of September 1875, and the first eight days of October. Much of this material was on hand, at the time that the road was taken out of the hands of the company on the 9th of October, by the order of the Circuit Court of the

in this suit as claims of creditors at large of the Chesapeake and Ohio Railroad Company?

I am not required to consider how these claims should be regarded if this were an application by the claimants to arrest the action of the trustees, or any of them, under the powers granted by their several deeds. This matter presents itself as incidental in the enforcement by a court of equity of the equitable rights of the bondholders under one of the deeds. So far as they are concerned, they have voluntarily subjected themselves to the enforcement of all equitable principles in the administration of the property under control of the court. The beneficiaries under the second mortgage of the Chesapeake and Ohio Railroad Company being subordinate in interest to them, must, I take it, necessarily bear the ill consequences, if any, of the fundamental rule of this court, invoked by the complainants, that he who asks equity must do equity.

I incline to the opinion that the beneficiaries under all the Virginia Central Railroad mortgages, though superior in dignity to those represented by the complainants, are in this suit amenable to the same rule. But it is unnecessary to consider that question. It is conceded on all hands that the claims of these creditors are paramount, and that payment in full of principal and interest will be made to them; and as the allowance of the claims under consideration—confessedly of a high equitable character—can only postpone the realization of their full rights, they must, under familiar principles governing all proceedings of courts of equity, submit to the delay.

I am of opinion that these unpaid employees and other claimants referred to cannot be regarded as creditors at large of the Chesapeake and Ohio Railroad Company. If it can be said that they

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United States for the Eastern District of Virginia; part of it is still on hand amongst the stores of the company; a part of it has been worked up in the repair of engines which are still undergoing repairs, and is not yet in use.

"The purchase of the articles, the subject of these claims, was regarded by those who sold them, and by the officers of the company who bought them, as a cash one, and payment was only delayed by the custom that prevails in mercantile transactions of a like character, of rendering monthly bills for the current month's supplies, and having them paid about the first of each month, instead of demanding cash for each article as it is furnished. These claims would, had not the United States Court taken the road out of the company's hands, all have been paid in the months of October and November, in the regular course of the company's business. They amount to about $17,000. I ask for authority to pay these claims."

extended credit at all, it was credit not to the Chesapeake and Ohio Railroad Company, but to the officers then in charge of its franchises, rights of property, &c. The Chesapeake and Ohio Railroad Company had been then so long in default that the right of the bondholders to claim possession was fully consummate, and this was a matter of common notoriety. It could not be expected that the employees all along the track of this road should pause amidst their unceasing round of daily duty to inquire whether the bondholders had or had not asserted their rights and assumed control. It was enough for them to know that the service they were rendering was such service as any proprietor would necessarily require, and they had a right to believe that the officers left in notorious occupancy of the property, and charged before the public with the responsibility of its care and custody, were abundantly authorized to act for all whom it might concern in contracting for their services.

The same principle will run through all the gradations of employment in this great corporation. These employees of every grade and dignity had every right to believe, that so long as the bondholders stood aloof without asserting their rights to possession, they were willing to accept and regard *pro tanto* as their agents for the preservation and protection of the property, the officers who, placed in charge thereof by their defaulting creditor, could not in good faith to the creditor or the debtor abandon their posts, or be derelict while they held them, to the trusts which they imposed.

These bondholders are now in a court of equity seeking satisfaction of their claims against the railroad company. They have a right to be satisfied to the extent of an entire forfeiture of all the proprietary rights of the company; but to concede to them, in enforcing such forfeiture, a right to repudiate all responsibility to satisfy these highly meritorious claims of employees, &c., out of the property or its future earnings, would be grossly inconsistent with plain equity. In this forum they must be held to be estopped from denying the authority of the officers of the company under the circumstances, as agents for themselves as well as other parties in interest, to have incurred such liability.

A recent decision of the Court of Appeals of Kentucky, in a somewhat similar case, of *Douglas, &c.*, v. *Cline, &c.*, of which I have been furnished by counsel with a newspaper report, fully sustains these views.